Part 201 Liability/Compliance Workgroup Summary – Meeting No. 2

November 1, 2006, 9:30 AM–12:30 p.m.
Public Sector Consultants
Lansing, Michigan

Workgroup Attendees
James Clift, Michigan Environmental Council
Steve Cunningham, RRD-Cadillac District Office
Charles Denton, Varnum & Riddering
Mark D. Jacobs, Dykema Gossett
Doug McDowell, McDowell & Associates
Pat McKay, RRD-Compliance and Enforcement Section
Richard Plewa, Comerica Bank
Mary Jane Rhoades, Rhoades McKee
Jeanne Schalufman, RRD-Southeast Michigan District Office
Alan Wasserman, Williams Acosta, PLLC
Ed Weglarz, Service Station Dealers Association of Michigan

Observers
Chuck Barbieri, Foster, Swift, Collins & Smith
Darrell Grassmyer, DTE Energy
Abgd Houssari, DTE Energy
Rhonda Klann, RRD
Gary Kohlhepp, DEQ-Water Bureau
Bob Wagner, RRD

Staff
Mark Coscarelli, Public Sector Consultants
Shivaugn Rayl, Public Sector Consultants

Agenda

I. Welcome and Introductions

Mark Coscarelli welcomed workgroup participants. Personal introductions followed.

II. Comments on October 19 Meeting Summary

Workgroup members requested that meeting summary documents not include attribution to a specific individual (except for the facilitator).

A question was asked about the process that will be used by PSC for producing a final report, including recommendations, from the 201 project participants. Mark indicated that each of

the four workgroups will develop a document that describes the issues examined by the workgroup, including recommendations for changes to the program going forward. The document will highlight points of convergence by workgroup members, points of disagreement, and issues that remain for additional review. The four documents will then be stitched into a comprehensive final report.

III. Permit Approach Comments

Mark informed the workgroup that while many individuals feel the permit program has merit to address some of the shortcomings in the Part 201 process, it may be better addressed by the Administration workgroup. Undoubtedly, there are underlying issues of substantive importance to the liability discussion that must be examined, whether under the current regulatory scheme, a permit-based system, or any other approach. The workgroup was then directed to keep on task with the directive issued by the Phase I Discussion group and work through the specific liability issues. Members were advised that they are free to bring up a permit system as a way to address a specific issue of liability, but the details of a permit system and its administration will not be the focus of discussion.

IV. Causation-Based Liability

The Workgroup identified several challenges related to enforcement under a causation based liability structure. It was stated that emphasis on a cost recovery model makes the liability standard very important. Cost recovery relies on the court system for enforcement. Going through the courts for enforcement is expensive and can be a daunting task for the DEQ. Funds expended for litigation activities and court-related activities are better spent on site clean up.

But given the state's experience with the current causation-based standard, the workgroup generally agreed that a return to strict liability is not desirable. The members agreed that a return to indiscriminate strict liability based on ownership of the contaminated site would not leave the state better off, and might be considered a 'draconian' measure by some.

However, there was some indication that the use of a default to strict liability for some owner/operators that don't comply with their legal obligations might be a useful disincentive to gain compliance. Currently, under the BEA process, an owner/operator who has purchased the site on or after June 5, 1995 who does not complete a BEA is jointly and severally liable for site contamination. This provision was intended to encourage new owner/operators to complete a BEA and receive liability protection. The consequence of not participating in the BEA process is vulnerability to joint and several liability; this should be a deterrent. Some interest was expressed in an approach to induce owner/operators to complete their due care plans or face an elevated liability standard.

It was explained that the causation based standard results in enforcement complications primarily at sites of historical contamination that have had multiple owners operating similar processes. It becomes almost impossible to determine the timeframe of a release to narrow the liability to a particular owner in the chain of title.

The question was asked: "Does the causation based standard improve the state of Michigan?" Conversation returned to the idea that strict liability was a failed experiment. Joint and

several, causation-based liability is the modern approach; it is seen as progressive in other jurisdictions though it may be imperfect.

V. Liable Parties

A fundamental question that emanated from the causation based liability discussion was 'who should be held responsible for cleanups?' A philosophical debate ensued about what amount of cost or risk the public should be made to bear in instances where a private entity 'fouled the commons for their private benefit.' The dialogue included mention that public funds designated for risk reduction should not be used in the courts determining liability, nor should they be used to pay for cleanups where a viable, liable party exits. Under the causation standard, enforcement requires expending funds to establish the high burden of proof.

There was discussion by the workgroup about what party should be liable. General agreement emerged that innocent purchasers interested in redeveloping sites should not fall under this category of potentially liable parties. The success of redevelopment programs hinge on liability protection for innocent purchasers. Currently, that liability protection exists in the form of the BEA. If the workgroup recommends discarding the BEA process, it was important to the members that some form of liability protection is provided to innocent parties to ensure real estate transactions continue and green fields do not become even more attractive to developers. It was noted that the causation based standard protects those parties eligible for Category N and D BEAs if the requirement to do a BEA is abolished.

VI. Presumptions of Liability and Burdens of Proof

As an alternative to changing the liability standard, it was suggested that burdens of proof be shifted. There was discussion about creating different presumptions of guilt and shifting burdens of proof to aid the DEQ enforcement efforts. The illustration mentioned was that of product line liability. For example, any owner/operator who used the contaminant in question in their process is presumed liable for the contamination until the owner/operator affirmatively proves otherwise. It was mentioned that this approach would make it more likely that DEQ could make a prima facie case against a potentially liable party and encourage settlements, and induce cleanups. It was also mentioned that there are challenges in 'proving a negative' and that the burden on the party presumed liable might be too onerous and would lead to a situation more similar to strict liability. The fact that liability, in these cases, wouldn't be based on causation is a source of hesitation for some group members. It was mentioned that the causation based standard already protects the Category N and D BEA owner/operators, and that more effort should be placed on determining liability under Category S BEAs or their equivalent.

One comment raised the possibility that this approach could provide incentives to manufacturers to change production methods away from those that use hazardous chemicals already present on the property. A category S BEA and a Due Care plan could protect a new owner/operator from the unfavorable presumptions.

General agreement was reached on the idea that new/innocent owner/operators must be distinguished in this process from liable parties. It was recognized that strict liability was a failure for the economy, and that if category S BEA's are made more difficult to accomplish,

it is effectively a return to strict liability. One suggestion was that these presumptions of guilt would only apply to historical contamination that are complex in nature. Historic would be defined as before June, 5 1995. In this scenario, strict liability would apply to those sites that were contaminated before June 5, 1995. This would be a return to the liability scheme that was in effect at the time of contamination. Sites that were brought under the Part 201 program after June 5, 1995 would have all the protections afforded by the BEA program.

A possible framework for this system follows:

- A presumption of liability exists if a party used chemicals that have caused contamination. This liability would extend to investigation of the site, source controls, pathway reductions, and remedial investigation. The goal would be to address immediate threats.
- Then, based on the investigation results, DEQ would use the causation based liability standard to force a cleanup from the identified potentially liable parties.
- If DEQ can't prove that the investigating party is liable for more cleanup, then it would get a release from the DEQ saying its portion of liability on the site has been capped at expenditures of step one above.

It was suggested that liability could be tied to due care, and the program could more closely mirror the Federal CERCLA approach. While most comments about due care indicate that it should be the focus of liability relief going forward, there was a concern that due care responsibilities are currently restricted to current, actual human exposures which is not comprehensive. It was suggested that if liability is tied to due care, then due care duties should include protection against natural resource exposures and potential human exposures. Currently, a violation of due care is subject to penalties.

It was suggested that divisibility of harm among liable parties should be put into the hands of private, multiple parties to sort out. Contribution standards need to be clarified in order to accomplish this. Covenants among private parties could also be used with greater frequency when transactions occur.

Proportional liability was briefly discussed, but it was understood to work best where there is enough information about the respective responsibilities of the parties to make a fair apportionment. It was suggested that a proportionally liable party be required to investigate the extent of their liability, and where the investigation is found to exceed his portion of liability, the entity would be reimbursed from a general fund, tax break, or contribution from other parties.

VII. Protecting Natural Resources and the Public Trust

It was stated that BEAs do not protect the environment. Neither do cleanups that allow source contamination to be left at the site. It was stated repeatedly that initial source removal is the best protection against liability, for the environment and public health. Where source removal is not used, and contamination remains in the environment, there are specific concerns associated with the public bearing the risk of the remaining contamination. Where contamination impacts the groundwater, it is affecting a public trust resource. The idea that the public agrees to accept the risk of contaminated groundwater and use alternate drinking

water source creates problems. It was stated that there are many sites around Michigan where the ground water is contaminated, and the residents in the area use a municipal water supply and are not at risk as a result. One suggestion was that natural resource damages should be assessed in situations where contamination of groundwater occurs, but is not threatening drinking water. Those damages could create a fund to benefit watershed protection elsewhere. This reflects the notion that available funds should be used where they have the biggest economic and health-protective benefit.

VIII. Due Care

The major emphasis in the Due care discussion was that Section 7a obligations should be more clearly defined so that owner/operator expectations are settled, and so they are more clearly enforceable.

One concern was that Due Care obligations should not become Remedial Investigation Feasibility Studies (RIFS). This view stated that Due Care should focus on exposure pathways and shutting them down. This is a result of opposition from the market to high requirements for site characterization.

One recommendation was that Due Care could be reduced to specific rules outlining pathway-specific exposures and correlated exposure limitations. This would increase both market certainty of expectations and agency enforcement ability because it creates a specific standard that can be monitored and enforced. Enforcement for a violation of due care would be penalties, and liability for any particular breach of due care for releases or to third parties (negligence).

There was discussion about Due Care obligations being in permit form. Section 7a is site specific by definition. A permit could be approved and become a living document. There was a question about whether these permits would be subject to public notice, and whether they are reviewable under the Administrative Procedures Act. Also, there was concern about what kind of entitlements attach to these permits.

IX. Conclusions and Recommendations

- Create rebuttable presumptions of guilt in favor of the DEQ.
- Allow private parties to dispute divisibility of harm issue amongst themselves.
- Shift the burden of proof to the defendant.
- Enable DEQ to access corporate documents under an expanded Section 17, where relevant, to better determine if certain corporate activities occur in attempt to escape liability under Part 201.
- 201 program changes must not provide disincentives to redevelop brownfields and chase owners/operators to greenfield development.
- Reduce Due Care obligations to elements of certainty that can be understood and enforced.

The meeting adjourned at 12:40 pm.